

NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND
MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
See Ariz. R. Supreme Court 111(c); ARCAP 28(c); Ariz. R. Crim. P. 31.24

FILED BY CLERK

DEC 28 2011

COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA,)	2 CA-CR 2011-0290-PR
)	DEPARTMENT A
Respondent,)	
)	<u>MEMORANDUM DECISION</u>
v.)	Not for Publication
)	Rule 111, Rules of
FRANKIE LEE RODRIGUEZ,)	the Supreme Court
)	
Petitioner.)	
_____)	

PETITION FOR REVIEW FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR20003991

Honorable Jose Robles, Judge Pro Tempore

REVIEW GRANTED; RELIEF DENIED

Barbara LaWall, Pima County Attorney
By Jacob R. Lines

Tucson
Attorneys for Respondent

Higgins & Higgins, P.C.
By Harold Higgins

Tucson
Attorneys for Petitioner

E C K E R S T R O M, Presiding Judge.

¶1 Petitioner Frankie Rodriguez was convicted after a jury trial of two counts each of first-degree murder, kidnapping, armed robbery, theft of means of transportation, and theft by control, and one count of second-degree burglary. The trial court sentenced

Rodriguez to multiple prison terms, the longest of which were two consecutive life sentences. We affirmed his convictions and sentences on appeal. *State v. Rodriguez*, No. 2 CA-CR 2003-0179 (memorandum decision filed Mar. 31, 2005). Rodriguez now seeks this court’s review of the trial court’s order denying relief on grounds raised in a petition for post-conviction relief filed pursuant to Rule 32, Ariz. R. Crim. P., and maintains he was entitled to an evidentiary hearing on these claims.¹ We will not disturb the court’s ruling unless it clearly has abused its discretion. *State v. Swoopes*, 216 Ariz. 390, ¶ 4, 166 P.3d 945, 948 (App. 2007). We find no such abuse here.

¶2 In his petition for review, Rodriguez reasserts the numerous claims he raised in his petition below. He contends a report issued by the National Academy of Sciences “years after this trial” constituted newly discovered evidence that would have challenged the testimony of the state’s ballistics expert and changed the outcome at trial; he argues the sentences imposed denied him due process and his right to a jury trial, despite conceding that *State v. Fell*, 210 Ariz. 554, ¶ 19, 115 P.3d 594, 600 (2005), holds otherwise; and, he asserts *Clark v. Arizona*, 548 U.S. 735 (2006), and *State v. Wright*, 214 Ariz. 540, 155 P.3d 1064 (App. 2007), constitute a significant change in the law regarding the scope of the impulsivity jury instruction given at trial.

¹We note Rodriguez does not appear to have requested an evidentiary hearing in his petition for post-conviction relief. Rather, he requested a new trial. In any event, Rodriguez was not entitled to such a hearing. See *State v. Runningeagle*, 176 Ariz. 59, 63, 859 P.2d 169, 173 (1993) (Rule 32 petitioner “entitled to an evidentiary hearing only when he presents a colorable claim—one that, if the allegations are true, might have changed the outcome”).

¶3 Rodriguez also raises several claims of ineffective assistance of both trial and appellate counsel. In order to state a claim of ineffective assistance of counsel, a defendant must establish that counsel's performance fell below an objectively reasonable professional standard and that the deficient performance was prejudicial to the defense. *Strickland v. Washington*, 466 U.S. 668, 687-88 (1984); *State v. Nash*, 143 Ariz. 392, 397, 694 P.2d 222, 227 (1985). Rodriguez asserts trial counsel failed to: (1) challenge his arrest; (2) move to suppress statements he made to the police; (3) move to sever the trials for the two homicides; (4) object to prosecutorial misconduct during opening statements and closing arguments; (5) object to the premeditation jury instruction, and appellate counsel failed to raise this issue on appeal; (6) make an adequate motion for judgment of acquittal under Rule 20, Ariz. R. Crim. P.; (7) request lesser-included offense instructions as to kidnapping and armed robbery; (8) object to the impulsivity jury instruction and that appellate counsel had failed to support with proper authority Rodriguez's claim that the trial court had improperly precluded his impulsivity defense; (9) call a witness to testify about the voluntariness of Rodriguez's statements to the police; (10) "object to the sentencing process . . . on the grounds set forth above or any other grounds"; (11) adequately inquire into alleged jury misconduct, and appellate counsel failed to raise this issue on appeal; (12) consult with Rodriguez regarding trial strategy and the right to testify; (13) pursue a plea agreement; (14) pursue the testimony of a witness who gave a statement to police officers "that tended to exonerate" Rodriguez; and, (15) move to suppress a victim's identification of him.

¶4 Based on the record before us, we cannot say the trial court abused its discretion in denying Rodriguez’s petition. The court denied relief in a detailed and thorough minute entry order that identified all of Rodriguez’s arguments and correctly ruled on them in a manner that will allow any future court to understand their resolution. We therefore approve and adopt the court’s ruling and see no need to restate it here. *See State v. Whipple*, 177 Ariz. 272, 274, 866 P.2d 1358, 1360 (App. 1993).

¶5 Because Rodriguez has not sustained his burden on review of establishing the trial court abused its discretion in denying post-conviction relief, we grant the petition for review but deny relief.

/s/ Peter J. Eckerstrom
PETER J. ECKERSTROM, Presiding Judge

CONCURRING:

/s/ J. William Brammer, Jr.
J. WILLIAM BRAMMER, JR., Judge

/s/ Virginia C. Kelly
VIRGINIA C. KELLY, Judge